In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
Petitioner,

vs.

KQED, INC., et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Thomas L. Houchins, Sheriff of the County of Alameda, State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case. The majority and concurring opinions of the Court of Appeals in this case are reported in 546 F.2d 284 (9th Cir. 1976); those opinions are reproduced in the Appendix to this Petition, Appx. pp. 1-26. The Court of Appeals affirmed an unreported decision of the United States District

Court for the Northern District of California, granting a preliminary injunction. The District Court's preliminary injunction and that court's accompanying memorandum and order are also reproduced in the Appendix, Appx. pp. 27-33.

JURISDICTION

The judgment of the Court of Appeals was dated and filed November 1, 1976. On November 15, 1976, Petitioner Sheriff Houchins ("Sheriff") filed his Petition for Rehearing (and suggestion that rehearing be in banc). On December 22, 1976, the Court of Appeals denied the Petition for Rehearing. (The order denying that petition is reprinted at Appx. p. 34.) The Court of Appeals also denied a motion for stay of mandate pending application for a writ of certiorari. There has been no application for, or order granting or denying, an extension of time within which the Sheriff may file this Petition for Writ of Certiorari. The Sheriff applied to this Court for a stay pending review on certiorari, and on January 28, 1977, Mr. Justice Rehnquist granted the stay. Mr. Justice Rehnquist's opinion with respect to that application and stay is reprinted in Appx. pp. 35-40.[1]

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review is, did the District Court err in granting a preliminary injunction requiring the Sheriff to grant to Respondent KQED, Inc. ("KQED") greater access to the Sheriff's county jail facility than the Sheriff grants to members of the public at large?

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1. In granting the stay, Mr. Justice Rehnquist stated ". . . that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the first instance by this Court, rather than by the Court of Appeals or by the District Court." Appx. pp. 38-39.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, reading in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

This case involves the access of the media to the inmates and premises of a county jail. As will be seen in detail hereafter, members of the general public may tour the Alameda County jail facilities at Santa Rita on one of the semi-monthly scheduled tours, and may communicate with the inmates in various other ways. However, the members of the public may not photograph the institution or inmates, and may not interview inmates, in the course of any tour. As will be further seen, media representatives have greater access to the facility and the inmates than do members of the public, but media representatives, like members of the public, may not photograph the institution or inmates, and may not interview inmates, in the course of the tour.

The complaint was filed in the District Court on June 17, 1975. Plaintiffs invoked the court's jurisdiction pursuant to 28 U.S.C. § 1343(3), stating that the suit was authorized by 42 U.S.C. § 1983. The plaintiffs in the District Court were KQED, Inc. and the Alameda and Oakland branches of the NAACP. KQED, Inc. is a non-profit corporation engaged in educational television and radio broadcasting. The NAACP plaintiffs are unincorporated associations (and the local branches of the national NAACP), whose members reside in Alameda and Oakland in Alameda County, California. Defendant Houchins was and is the Sheriff of Alameda County. He has been employed by Alameda County Sheriff's Department for thirty years, including five as commanding officer at Santa Rita. He was the Assist-

ant Sheriff (or Undersheriff) for five years, and was elected Sheriff effective January 1, 1975. As Sheriff he has general supervision and control of all Alameda County jail facilities, including those located at Santa Rita.

In its complaint KQED alleged that it had asked the Sheriff for permission to inspect the maximum security portion of Santa Rita, a building commonly referred to as Greystone. (Santa Rita also has medium and minimum security facilities, called Little Greystone and the Compound, respectively.) The Sheriff had refused the request. KQED, simultaneously with filing the complaint, moved for the issuance of a preliminary injunction enjoining the Sheriff, during the pendency of the action, from excluding KQED from the premises. The Sheriff filed an opposition to the motion, and an answer. In the answer, the Sheriff alleged (in reply to the request for admission to the facility) that if KQED were permitted to enter, then all other media representatives would have to be given similar privileges; that such spasmodic tours would be unduly disruptive to the operations of the facility; and that KQED, other media representatives, and the general public could view the facilities on the then-planned public tours.

Further memoranda and affidavits were submitted to the District Court. An evidentiary hearing was held on November 6 and November 10, 1975. On November 20, 1975, the District Court issued its preliminary injunction, together with its memorandum and order explaining the same. The District Court determined (1) that press [media] access must be allowed greater than that afforded the general public; that is, the press must not be prevented from providing "full and accurate coverage of conditions", and may not be denied access to any of the facilities at reasonable times and hours; (2) that such access must at least include the use of cameras and sound equipment,

and inmate interviews; and (3) that access may be restricted only in the event of jail tensions or other dangerous circumstances. Appx. pp. 27-28.

On December 4, 1975, the Sheriff appealed to the Court of Appeals for the Ninth Circuit. On the same day the Sheriff sought and was denied a stay of the preliminary injunction in the United States District Court pending determination of the matter on appeal. The Sheriff then applied on the same day for a stay in the Court of Appeals. The Court of Appeals, per Chambers and Snead, Circuit Judges, granted the stay, saying

> Upon due consideration, the petition for stay of injunction pending appeal is granted. The injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay.

A different panel of the Court of Appeals heard and decided the case, and the opinion of that court was filed on November 1, 1976. The subsequent history of the case has previously been related.

KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate. However, in view of the legal issue presented, it remains necessary to discuss the access afforded the members of the public.

A. Mail

The rules for inmate conduct were introduced in evidence, and include rules with respect to mail. For inmates in the maximum security area, for example, the rules may be summarized as follows: there is no limitation on the number of letters an

inmate may send or receive; there is no limitation on the persons to or from whom letters may be sent or received. Letters to and from members of the public (including media representatives) would be inspected for contraband, but would not be read. Inmates without funds for pens, paper, and stamps would receive the same free of charge.

B. Visiting

Sentenced inmates may be visited from 11:30 a.m. to 2:30 p.m. on Sundays. There is no age limitation on visitors, except that a visitor under eighteen years of age must be accompanied by an adult. There are no lists of approved visitors.[2] Except for restrictions with respect to those visitors who have been previously confined in penal institutions, there are no limitations with respect to the identity of the visitor. Unless a media representative fell within these two limitations, any reporter could visit any inmate.

Pre-trial detainees may be visited on Sundays from 11:30 a.m. to 3:30 p.m., and on Tuesdays, Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m. In other respects the pre-trial detainees are subject to the same restrictions as are sentenced inmates, except, of course, that counsel may visit at any reasonable time.

Apart from visitation, pre-trial detainess may be interviewed by a media representative (but not by a member of the general public), if the written consents of the detainee, his attorney, and the court having jurisdiction have first been obtained. These interviews could be photographed or recorded. Similarly apart from visitation, sentenced inmates may be interviewed upon their

2. This reflects an even more expansive policy than was approved in *Pell v. Procunier,* 417 U.S. 817, 824-825 (1974), where the Court found that the visitation policy in San Quentin, permitting only limited visits from members of the inmates' families, the clergy, their attorneys, and friends of prior acquaintance, did not seal the inmate off from personal contact with those outside the prison.

release from the facility.[3] The Sheriff has offered to inform the media representatives upon request of the time of departure from Santa Rita and expected arrival in Oakland of the release bus containing inmates being released. Interviews of released inmates could, it is submitted, be conducted in an atmosphere free from any real or imagined pressures, either from other inmates, on the one hand, or from the Sheriff's staff, on the other. No media representative has ever asked the Sheriff for this information, or taken advantage of this offer.

C. Telephone

Inmates in the maximum security facility may make unmonitored, collect telephone calls without restriction. The nature of telephone access by inmates housed elsewhere is not disclosed in the record.

D. Public Tours

Since shortly after assuming office in January, 1975, the Sheriff planned public tours of Santa Rita. Indeed, at the time the complaint was filed KQED knew that the tours would commence. The first tour was held on July 14, 1975. At first the tours took place monthly, and waiting lists built up. Beginning in January, 1976, the tours have been held semi-monthly. The tours have also been expanded in size so that thirty persons may go on each tour. That situation still obtains. Since January, 1976, there has been essentially no waiting list for the tours.

The tours cover virtually all of the facilities at Santa Rita. The District Court heard testimony illustrating in detail the route

3. The facility is, of course, a county jail. Statistics in evidence indicate that sentenced inmates are incarcerated, on the average, for thirty-two days, and that pre-trial detainees are incarcerated, on the average, for ten days. The nature of the inmate population has changed radically over recent years, in that the inmates are more difficult to handle.

of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. Plans of the facility were admitted in evidence to illustrate the course of the tour, and photographs were also admitted in evidence. (Those photographs are also offered for sale at a reasonable price to those taking the tour.) Almost all portions of the maximum security facility, Greystone, are covered on the tour: its cells, day-rooms, exercise yard, kitchen, and dining halls.[4]

The tour was criticized for being scheduled, rather than on demand; for not permitting the interviewing of inmates and the photographing of inmates and the facilities during the tour; for not including the pre-trial detainee barracks commonly known as Little Greystone on the tour (although the interior of that building is identical to that of the other barracks, which are included); and for not having inmates on view. These criticisms were, of course, from the point of view of a media representative, as such, and not from the point of view of a member of the public. There was no evidence or argument that the tours were inadequate in any way with respect to the public. No testimony whatever was presented by the NAACP plaintiffs or their members.

Testimony was presented on behalf of the Sheriff explaining why it was difficult to accede to KQED's request that tours be available to the press on demand, and that such tours permit interviewing of inmates and photographing of inmates and the facilities. First, such a program would be extremely disruptive.

4. Greystone is the facility involved in *Brenneman v. Madigan*, 343 F.Supp. 128 (N.D.Cal. 1972). After that decision was filed, extensive renovations and additions were made to Greystone, and as a result of those improvements (together with the County's assurances that it intended to proceed with the construction of new jail facilities) the *Brenneman* case was dismissed. The *Brenneman* case is referred to in footnote 1 in the opinion of the Court of Appeals in this case, Appx., p. 2. In view of the comprehensive tour of the Greystone facility, the remark of the Court of Appeals in footnote 2 of its opinion, Appx., p. 3, is inexplicable.

The facility runs on a tight schedule, involving very frequent moving of inmates. Those movements include to and from classes, meals, and work, as well as movements to operate the facility and to transport pre-trial detainees to and from the courts. (Most of the courts are located a considerable distance away from Santa Rita.)

Moreover, during the tour the inmates must be locked in their cells or otherwise removed from contact with the visitors. No interviewing or photographing of pre-trial detainees could be accomplished without their consent and the consent of their attorneys and the courts; the difficulties involved in this aspect of the matter are compounded because one cannot identify a pre-trial detainee merely by looking at him or by determining where he is housed.

There are, in addition, security devices throughout the institution which may not be photographed.

The result of all of these concerns of the Sheriff is that close supervision is requered by the Sheriff's personnel of anyone taking photographs or interviewing inmates. Equipment brought on the premises must be searched. Thus the Sheriff concluded that visits could not be conducted on demand, or indeed on any basis other than a scheduled one. Scheduled tours exclusively for the media, however, permitting the use of cameras, but without interviews, could be accommodated.

The media representatives may go on the public tours. In addition to those tours, there is now, and has been, media access (with cameras) for special events, such as fires or escapes. KQED has participated in these special media openings. (Compare the remark of the Court of Appeals, Appx. p. 4: "Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, ..." That access exists.)

The District Court in its memorandum accompanying its preliminary injunction did not criticize in any way the access granted the public, as such, to the inmates or to the Sheriff's facilities; indeed, the subject was apparently not even considered relevant.[5] Instead, the entire burden of the District Court's remarks was directed to a critique of the Sheriff's fears with respect to media entry, and a comparison of his actions with the press policies of the San Francisco Sheriff and of the state authorities at San Quentin.[6] The District Court adjudged the Sheriff to have an inadequate *media* policy, and therefore enjoined him to develop an adequate media policy within the limits set forth in its memorandum and its preliminary injunction. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is in Conflict with Decisions of the Supreme Court.

A. THE PUBLIC'S RIGHT OF ACCESS TO THE JAIL MEETS CONSTITUTIONAL REQUIREMENTS.

But for the statement of District Judge Pregerson quoted in footnote 5, *supra,* that the District Court had determined the public access to be constitutionally inadequate, the above-cap-

5. Thus District Judge Pregerson, writing for the Court of Appeals, is patently incorrect when he asserts, Appx., p. 3● that

> Implicit in the trial court's memorandum granting the preliminary injunctions (sic) is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy.

On the contrary, there is no evidence that the District Court ever considered what the rights of the public were. KQED did not argue in its Motion for Preliminary Injunction that the public's rights were violated, and despite the fact that the Sheriff urged, in his Opposition, that the extent of the public's right of access was the central legal question, neither the District Court's memorandum nor its preliminary injunction addresses the point.

6. The District Court did not deal with the *public* access to San Quentin, which was much more limited than the public access to Santa Rita. See discussion pp. 11-12 below.

tioned proposition need not be argued. That proposition was not challenged in the proceedings before the District Court.

The Supreme Court has said that it is a "truism that prisons are institutions where public access is generally limited." *Saxbe v. Washington Post Co.,* 417 U.S. 843, 849 (1974). The parameters of that access set by professional correctional officials are usually accepted by the courts, just as are other similar professional judgments by those officials. *Pell v. Procunier,* 417 U.S. 817, 826-827 (1974). See also *Adderley v. Florida,* 385 U.S. 39 (1966). The facts concerning the public's access to the Sheriff's jail have been previously discussed.

In *Pell v. Procunier, supra,* the Court discussed the available means of communication between the public and the inmates and premises of the state prison at San Quentin. As in *Pell,* the Sheriff here permits virtually unimpeded communication by mail. See 417 U.S. at 824. But in San Quentin, personal visitation was limited to members of the family, the clergy, the attorneys of the inmates, and friends of prior acquaintance. 417 U.S. at 824-825. The Sheriff's policy is much more liberal—there is no restriction on who may visit, other than as indicated previously. Turning to public tours: as of May 1975,[7] San Quentin conducted 24 dinner tours for the public each year, intended primarily for organized groups such as churches and bar associations. There was approximately a one-year waiting period for these dinner tours. There was no other public access to the facilities. The San Quentin rules made it clear that there were to be no cameras and no contact with or interviewing of inmates permitted. (Indeed, the inmates were moved out of the areas to be visited before the visitors arrived.) The Sheriff's tours grant greater public access to his facility than do the San Quentin tours. It is therefore submitted that the Court's summation in *Pell* of the San Quentin situation, "the record demonstrates that, under current corrections policy,

7. *Pell* was decided in 1974.

both the press and the general public are accorded full opportunities to observe prison conditions", 417 U.S. at 830, applies to the Sheriff's facilities at Santa Rita.

But District Judge Pregerson, writing for the Court of Appeals, seems to find that the Sheriff is unconstitutionally limiting the public's access to his facility:

> Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. (Appx. p. 3.)

If left to stand, this statement by the Court of Appeals that the program of public access to a prison or jail as described in that opinion is constitutionally inadequate will have national consequences: this will be the first reported decision of any court that a comprehensive program of public tours of a jail is insufficient as a matter of law. Even KQED had urged that this was not the occasion to make a determination of the public's rights. This assertion of the Court of Appeals requires the assumption that despite express language to the contrary, the District Court's preliminary injunction was both intended to apply, and in fact applies, to a member of the public as well as to the media. It is submitted that the District Court had no such intention or belief, and further that there is nothing in the record which would support such a determination even if the District Court did so intend. Finally, such a finding is in direct conflict with the determination of the Supreme Court in *Pell*.

B. THE MEDIA'S RIGHT OF ACCESS TO THE JAIL MEETS CONSTITUTIONAL REQUIREMENTS.

The preliminary injunction forbids the Sheriff to deny access to any of the facilities at reasonable times and hours; states that such access must at least include the use of cameras and sound equipment, and inmate interviews; and implies that such access

may be restricted only in the event of jail tensions or other dangerous circumstances. Appx., p. 28. That kind of access is not provided the general public, and it is submitted that therefore such access is not constitutionally required.

> [N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. [¶] . . . The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, at 850 (1974).[8]

As Circuit Judge Duniway notes in his concurring opinion for the Court of Appeals, "It [is] clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita jail than is granted to the public. [¶] I cannot reconcile this result with the decisions in [*Pell* and *Saxbe*]." Appx. p. 21. But despite the unequivocal holdings of *Pell* and *Saxbe*, the three-member panel of the Court of Appeals affirmed the District Court's order and preliminary injunction without modification.

District Judge Pregerson attempts to make the dubious distinction that the co-extensive rights of access by the media and the public, required to be recognized by *Pell*, do not require identical

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8. See also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), where the court said, "The right to speak and publish does not carry with it the unrestrained right to gather information"; *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972), "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally . . ."; *Mazzetti v. United States*, 518 F.2d 781, 783 (10th Cir. 1975), where the suggestion that the status of a newsman should carry a special First Amendment impact was soundly refuted by the court.

implementation. Appx. pp. 3-4.[9] Circuit Judge Hufstedler makes the same point. After reaching the conclusion that "news media, as surrogates for the public, cannot claim any constitutional entitlement to acquire information from which the general public is appropriately excluded," Appx. p. 24, she then converts the "public" into a "tour group", and finds that news media representatives ought to have greater access than does a tour group. Appx. pp. 25-26. These conclusions by the two judges, that the media is entitled to greater access than is the public, are in direct conflict with this Court's holdings.

Moreover, the decision of the Court of Appeals also departs from the Ninth Circuit's previous resolution of the problem. In an action by a newspaper guild seeking to enjoin prison officials from denying the news media the right to interview prisoners, a different three-member panel of the Court of Appeals held that the ban on interviews did not unduly restrict the flow of information to the public. *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1062 (9th Cir. 1973). The Guild had contended, based on *Branzburg v. Hayes,* 418 U.S. 665, 681 (1972), that there was an absolute right to gather news. In response to this contention, the Court of Appeals, quoting from *Zemel v. Rusk,* 381 U.S. 1, 17 (1965), stated: ". . . The right to speak and publish does not carry with it the unrestrained right to gather information." 480 F.2d at 1067.

Other circuit courts, in deciding cases involving prison access by the press, have applied the rule of *Pell* and *Saxbe* without the difficulties encountered by the Court of Appeals in this case. For

9. District Judge Pregerson states: ". . . the court did not err by issuing an injunction that, on its face, grants greater prison access to the news media than the access accorded the public on monthly guided tours of the facility . . . The access needs of news media and the public differ." Appx., p. 4.

example, the Court of Appeals for the First Circuit set aside its own judgment after considering the impact of *Pell* and *Saxbe.* In that case an author, under contract to write a biography of James Earl Ray, sought access to Ray's brother, a federal prisoner, for an interview. The court was of the opinion when it decided the case initially that "If any access is ever to be permitted, the hard core of allowed access would include . . . this case . . .", *McMillan v. Carlson,* 493 F.2d 1217 (1st Cir., 1974). But in light of *Pell* and *Saxbe,* not even this access could be compelled, and the court properly set aside its order in order to comply with this Court's decisions.[10]

II. The Decision of the Court of Appeals Raises Important Questions Concerning (A) the Administration of Correctional Facilities Throughout the Country, and (B) the Extent of the Media's First Amendment Right to Gather News.

The erroneous decision of the Court of Appeals has national consequences in at least two respects.

In the first place, the characterization of the Sheriff's public and media access program as unconstitutionally narrow will require every other administrator of correctional facilities to do more. Since the Sheriff's public access program is greater than was approved in *Pell,* as has previously been demonstrated, the result is to impose a burden on these administrators which they are not lawfully required to bear.

Moreover, the Court of Appeals has become more involved in prison administration than the guidelines of this Court would permit. Both prisons and jails must house large numbers of

10. See also *Main Road v. Aytch,* 522 F.2d 1080, 1090 (3rd Cir. 1975), wherein the Third Circuit instructed the District Court, on remand, to direct that *if* the prison superintendent "intends to continue to grant some but not all prisoner requests for interviews and press conferences," he should develop appropriate regulations concerning the granting of permission. Implicit in this decision is the conclusion that a total ban on individual interviews and press conferences is constitutional.

people and, at the same time, maintain internal order and discipline. Internal security within the correctional facilities is central to all other correctional goals. *Pell,* at page 823. Without such security, the other aims of the correctional system will necessarily cease. In view of the numerous alternative means for members of the media to communicate with jail inmates and to become informed of conditions within the jail, the elevation to a constitutional level of the right of access here demanded is without justification. As stated in *Pell,* "So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude.' *Cruz v. Beto,* 405 U.S., at 321." *Pell,* at page 826.

Secondly, the Court of Appeals has simply not followed the decisions of this Court in *Pell* and *Saxbe.* One of the Circuit Judges conceded that the effect of the decision of the Court of Appeals is to give the press greater rights than are required to be given the public. As Mr. Justice Rehnquist put it in granting the stay, this is "a result seemingly inconsistent with our holding in *Pell* that the press is not entitled to greater access." Appx., p. 37. The ramifications of this erroneous conclusion are not confined to the correctional system, but rather extend to all aspects of American public life where citizens and the media seek information.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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(Appendix follows)

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*We acknowledge the assistance of law student Diana M. Allen in the preparation of this petition.

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 75-3643

KQED, Inc., Alameda Branch and
Oakland Branch, National Association
for the Advancement of Colored People,
Plaintiffs-Appellees,

vs.

Thomas L. Houchins, individually
and in his official capacity as Sheriff
of Alameda County,
Defendant-Appellant.

OPINION

[November 1, 1976]

On Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and HUFSTEDLER, Circuit Judges,
and PREGERSON,* District Judge.

PREGERSON, District Judge:

This is an appeal from the trial court's issuance of a preliminary injunction restraining appellant, the Sheriff of Alameda County, California, from depriving appellees of their First and Fourteenth Amendment rights by "excluding as a matter of general policy . . . responsible representatives of the news media

*The Honorable Harry Pregerson, United States District Court Judge for the Central District of California, sitting by designation.

from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof. . . .[1] To allow "full and accurate coverage" of jail conditions, the preliminary injunction requires that the reporters be given access to Santa Rita "at reasonable times and hours," and that they be allowed to use photographic and sound equipment and to interview inmates. The specific method of implementing media access was left to the Sheriff's determination, and the Sheriff was given discretion to exclude the media when jail tensions made such access dangerous. The question presented on appeal is whether the terms of this preliminary injunction, entered after a full evidentiary hearing, constitute an abuse of the trial court's discretion.

Clearly, the First Amendment grants the news media a constitutionally protected right to gather news. *See Branzburg v. Hayes,* 408 U.S. 665, 681-707 (1972), *Pell v. Procunier,* 417 U.S. 817, 833 (1974). This right is indispensable in preserving the news media as a major source of information for the public, particularly when the information sought concerns governmental institutions, including prisons. *See Mills v. Alabama,* 384 U.S. 214, 219 (1966). The conditions of our nation's prisons "are a matter that is both newsworthy and of great public importance." *Pell v. Procunier,* 417 U.S. at 830 n.7.

The parties, however, dispute whether the scope of this newsgathering right encompasses the kind of access to Santa Rita Jail granted the news media by the preliminary injunction. Appellant relies on the Supreme Court's observation that "newsmen have no constitutional right of access to prisons or their

1. *Brenneman v. Madigan,* 343 F. Supp. 128, 133 (N.D. Cal. 1972) described conditions at the Greystone building at the Santa Rita facility as "truly deplorable." The district judge held that the "shocking and debasing conditions which prevailed there constituted cruel and unusual punishment for man or beast as a matter of law." [1]

inmates beyond that afforded the general public."[2] *Pell v. Procunier,* 417 U.S. at 834. On the basis of this statement, appellant argues that this preliminary injunction is an abuse of discretion because it permits reporters to view Santa Rita Jail and communicate with its inmates in ways denied the public during scheduled monthly tours of the facility.

The above-quoted language from *Pell v. Procunier* simply states that the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right. Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy. Although the memorandum does not explicitly mention the public's rights, the trial court applied the proper test to determine whether these rights were infringed: a governmental restriction on First Amendment rights can be upheld only if the restriction furthers an important or substantial governmental interest unrelated to suppressing speech and the restriction is the least drastic means of furthering that governmental interest. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968). The preliminary injunction, while protecting First Amendment rights, also satisfies the governmental interests in security of the jail and privacy of inmates. The Sheriff can exclude media access when jail security is threatened, make reasonable time, place, and manner restrictions, and develop appropriate administrative

2. The Supreme Court found that the regulation limiting press access in *Pell v. Procunier* was "not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." 417 U.S. at 830. The Court observed: "Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions." *Id.* In contrast, the Santa Rita Jail was completely closed to both the news media and the public prior to the filing of the present suit. After suit was filed, appellant inaugurated a program of monthly public tours of Santa Rita. Appellees presented evidence that these tours were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversations with inmates, and omitted views of many parts of the jail, including the notorious Greystone Building. [2]

regulations that require searches of reporters, identification of press representatives, and consent from inmates for interviews and photographs.

Having determined that appellant's restrictive policy was an infringement of constitutional rights, the court did not err by issuing an injunction that, on its face, grants greater prison access to the news media than the access accorded the public on monthly guided tours of the facility. *Pell v. Procunier* does not stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically. The access needs of the news media and the public differ. Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, while the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours. Moreover, the administrative problems inherent in public and media access differ. A large public tour [3] group creates a greater security threat and requires the use of more jail personnel to supervise the tour, while a single reporter, known to jail officials, should cause minimal, if any, interference to jail routine. Although both groups have an equal constitutional right of access to jails, because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights not be identical.

In the circumstances of this case, we cannot say that the trial court's issuance of the preliminary injunction was an abuse of discretion. Its order granting the preliminary injunction is therefore affirmed.

To determine the questions of infringement of the correlative rights of the public and the media and the means by which these rights are to be implemented, the trial court should consider the kind of access accorded the news media and the public in the California state prison system, as discussed in *Pell v. Procunier,* and the access accorded by the federal prison system as set forth in Policy Statement No. 1220.1B, a copy of which is attached as Appendix A. [4]

Appendix A

FEDERAL PRISON SYSTEM — WASHINGTON, D. C. 20534

POLICY STATEMENT — NUMBER 1220.1B

SUBJECT: CONTACTS WITH NEWS MEDIA — DATE 7/1/76

1. PURPOSE. To establish, for a trial period of July 1 - December 31, 1976, the policy of the Bureau of Prisons with respect to the news media.

2. POLICY. The Bureau of Prisons recognizes the desirability of establishing a policy that affords the public greater access to news about its operations. The policy is not designed to provide publicity for inmates or special privileges for the news media, but rather to insure a better informed public. The correspondence and interviews, in a prison setting, must be regulated to insure the orderly and safe operation of the institution.

3. DIRECTIVE AFFECTED. Policy Statements 1220.1A and 1220.6/7300.96 are superseded by this Policy Statement.

4. PROCEDURE.

a. *Application*

(1) For the purposes of this policy statement representatives of news media shall be defined as the following: Persons who are primarily employed in the business of gathering or reporting news for (a) a newspaper qualifying as a general circulation newspaper in the community to which it publishes, (b) news magazines having a national circulation being sold by newsstands to the general public and by mail circulation, (c) national or international news services, (d) radio and television news

programs of stations holding Federal Communication Commission Licenses.

Persons currently confined as prison inmates may not be employed or used as reporters under this policy statement. [5]

A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character and of general interest. A key test to determine whether a newspaper qualifies as a "general

circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes. It is generally held that for a newspaper to be considered in law a newspaper of general circulation, and so be qualified to publish legal notices, it must contain items of general interest to the public such as news of political, religious, commercial, or social affairs.

(2) Interviews by reporters and others not included in 4a(1), may be permitted only by special arrangement and with approval of the Warden.

(3) These regulations apply to all inmates in Federal institutions. When an inmate is confined in any non-Federal facility the local or state facility rules and regulations will govern.

b. *Institution Visits.*

(1) Representatives of the news and other media are encouraged to visit Bureau institutions for the purpose of preparing reports about institutional facilities, programs and activities. Media representatives shall make advance appointments for visits. During an institutional

emergency, and for a reasonable time thereafter, the Warden may suspend all such media visits.

(2) When media representatives visit institutions, photographs of programs and activities may be taken, and media representatives may meet with groups of inmates engaged in authorized programs and activities. Inmates have the right not to be photographed, (still, movie or video), and not to have their voices recorded by the [6] media. Visiting representatives shall be required to obtain permission before photographing or recording the voices of inmates participating in authorized programs and activities and shall be advised that use of names, identifiable photos of inmates, and voice recordings are not encouraged, but if taken or made releases must be signed by the inmates and placed in their respective files.

(3) The Bureau of Prisons has no objection to visits by news media representatives to schools or business establishments which employ offenders in community programs for the purpose of viewing offenders in community programs. It is the responsibility of the media representatives

to obtain permission of the school or employer in advance. The rules outlined in paragraph (2) above apply to the community situation.

c. *Correspondence.*

(1) An inmate may write to representatives, specified by name or title, of the news media or other publications. Correspondence to a newsman may be sent through the Prisoners Mail Box, which provides for unopened correspondence. All properly identified and labeled correspondence to qualifying representatives of the news media shall be forwarded directly, promptly, sealed and without in-

spection. If there is doubt as to whether a representative qualifies, the institution should contact the Bureau's public information officer in the Central Office.

(2) Representatives of the news media or other publications may initiate correspondence with a particular inmate. Incoming correspondence from the news media or other publications will be inspected for contraband, and for content which is likely to promote illegal activity, or conduct contrary to Bureau regulations. A rejected letter will be returned to the author, with a brief explanation for the rejection. The author will also be notified that he or she may protest the rejection, and the complaint [7] will be referred to an official other than the individual who originally disapproved the correspondence for review.

(3) The inmate may not receive any compensation, nor anything of value, for correspondence or interviews with the news media as defined in paragraph 4a(1).

(4) A transmittal letter, similar to the attached sample, will be attached to the outgoing Prisoners Mail Box letter, and the properly labeled mail will be sent each working day, at government expense.

d. *Personal Interviews.*

(1) Either an inmate or a representative of the news media may initiate a request for a personal interview at an institution. *As a prerequisite to the interview, the inmate must authorize the institution staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments.*

[Page 4 1220.1B 7/1/76]

(2) If the news media representative wishes to conduct a personal interview at the institution, and makes a written request directed to the Chief Executive Officer of the institution for authorization, it will be permitted subject to the conditions of this policy statement.

(3) Representatives of the news media may request to interview a particular inmate. The request shall be made in writing to the Warden of the institution within a reasonable period of time—normally within 24 to 48 hours—prior to the requested time for the interview.

(4) The inmate will be notified by the institution of the interview request and must agree to be interviewed by signing a consent form (attachment 3) before the request will be considered. The written consent or denial shall, in all cases, be placed in the inmate's central file.

(5) A request will normally be approved or disapproved within 24 to 48 hours. An interview may be disapproved for any of the following reasons, provided that the Warden documents any such disapproval: [8]

(a) The news media representative, or the news organization which he or she represents, does not agree to the conditions established by this policy or has, in the past, failed to abide by the required conditions.

(b) The inmate is physically or mentally unable to participate. This shall be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval.

(c) The inmate is a juvenile (under 18) and written consent has not been obtained from his parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are unknown, the Warden of the institution shall notify the representative of the

news media of the inmate's statute as a juvenile, and shall then consider the authorization after placing a copy of the inmate's written consent in his file.

(d) Such interview, in the opinion of the Warden of the institution, would endanger the health or

safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(e) The inmate is involved in a pending court action and the court having jurisdiction over the matter has issued a "gag rule." In the case of unconvicted persons (including competency commitments under 18 U.S.C. 4244 and 4246) held in Federal institutions, interviews should not be authorized until there is clearance with the court having jurisdiction, ordinarily through the U.S. Attorney's office. In some districts, there may be a standing authorization for interviews, in the absence [9] of individual "gag orders," but in other districts, all pretrial inmates may need to be cleared upon request for interviews.

(f) The inmate is a "protection" case and revelation of his or her whereabouts would endanger his or her safety.

(6) Interviews will be held in the institution visiting room during normal weekday business hours unless the Warden of the institution determines that another location is more suitable. Interviews will be limited to two one-hour interviews per inmate per month. If the Warden determines that interviews are imposing a serious drain on the staff or use of the facilities, interview time for the entire institution may be limited. Such a limit shall be established on an institution-by-institution basis and shall be made a part of the institution's policy covering this subject. Due to the special security, custodial, and supervisory requirements necessitated by such interviews, an inmate in segregation, restricted, holdover, or hospital status may be limited to a one-hour interview per month.

(7) Interviews will not be subject to auditory monitoring or supervision.

(8) Photographs or audio or video recordings may be taken during interviews in accordance with the conditions outlined in 4b(2). If the Warden of the institution determines that the presence of video, film, or audio equipment or personnel would be likely to create a disruption within the institution, such equipment or personnel may be limited. For example, in the case of inter-

views conducted in visiting rooms which are frequently crowded, or in visiting rooms of maximum security institutions, the Warden may limit the equipment to hand held cameras or recorders.

(9) If in conjunction with an interview of an individual inmate the news media representative wishes to tour [10] the institution and take photographs or make recordings of other inmates, he or she must comply with the procedures set out in 4b(2).

e. *Press Pools.*

Whenever the frequency of requests for interviews and visits reaches a volume as is determined by the Warden to warrant limitations, a press pool may be established. In this situation, all news media representatives having requested interviews or visits which have not been con-

ducted shall be notified that selected representatives shall be admitted to the institution to conduct interviews under such guidelines as the Warden establishes. All material generated from such a press pool shall be made available to all news media, without right of first publication or broadcast. The press pool shall be composed of no more than one representative from each of the following groups present. The representatives shall be selected by the members of the respective groups.

(1) The national and international news services;
(2) The television and radio networks and outlets;
(3) The news magazines and newspapers; and,
(4) All media in the local community where the institution is located.

f. *Release of Information.*

(1) Announcements of unusual incidents shall be made to local news media as promptly as possible by the Warden or by a staff member designated by him. The institution will prepare a statement for release to the media, briefly stating the facts. The text of such messages shall be transmitted to the Bureau as part of the reports required on the incidents to which they relate. If it can reasonably be assumed that the wire services or the Washington press will make inquiry at the Central Office, the text should be communicated to the Central Office by telephone.

(2) Announcements related to Bureau Policy, such as changes in institutional missions, type of inmate popula-

 tion, as well as announcements of changes in executive personnel, will be made by the Central Office. Press inquiries on such subjects shall be referred to the public

information officer of the Bureau of Prisons in Washington.

(3) Information about an inmate that is a matter of public record will be provided by the Warden or his representative to representatives of the news media upon request. Such information shall be limited to the inmate's name, register number, place of incarceration (provided it is not confidential for protection), age, race, offense for which convicted, court where sentenced, length of sentence, date of sentencing, date of arrival, past movements via transfers or writs, general institutional assignments, parole eligibility date, and date of expiration of sentence. Other contents of inmate files are confidential. Requests for additional information about individual inmates shall be referred to the Central Office. The Warden of each institution, or his designated representative, shall be solely responsible for contacts with the press. Other staff members shall refer all press inquiries to the Warden or his designee.

g. *Special Conditions.*

(1) Authorization for institution visits or interviews shall be conditioned upon the news media representative certifying that he or she is familiar with the rules and regulations governing his conduct during interviews and visits and that he or she agrees to comply with them. Certification shall be done by use of an affidavit similar to the attached.

(2) The Bureau has a responsibility to protect the rights of all inmates and members of its staff. It is expected, as a condition for authorizing interviews and making facilities available to conduct an interview, that the news media representative will make a reasonable

attempt to verify any allegations regarding an inmate, [12] staff member, or institution and will provide an opportunity to respond to any allegation which might be published or broadcast prior to such distribution.

(3) *Representatives of the news media will collect information only from the primary source. The Bureau considers it highly improper and a violation of this policy to obtain and use personal information from one inmate about another inmate who refuses to be interviewed.*

(4) While in an institution, representatives of the news media are subject to applicable rules and regulations of the institution. Discussions or comments regarding applicability of any rule, regulation or order should be conducted with the administrator of the institution, or person specifically designated by him.

h. *Interpretations.*
Any question as to the meaning or application of this policy statement will be resolved by the Director of the Bureau of Prisons.

5. ACTION. Institution Policy Statements relating to correspondence and interviews with the news media shall be amended promptly to be in compliance with this issuance. Any modification of this policy statement must be submitted to the Assistant Director, Correctional Programs Division, within 30 days from receipt of this policy statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons
Commissioner, Federal Prison Industries, Inc. [13]

Attachment 1

BP-DIR-12 1220.1B
July, 1976 7/1/76

AFFIDAVIT

State of .....) Inmate's Name .....
) ss.:
County of .....) Inmate's Number .....

I, ..., after first being duly sworn, do hereby state that I am primarily employed in the business of gathering or reporting news for a newspaper qualifying as a general circulation newspaper in the community to which it publishes; or a magazine or periodical having a national circulation; or national or international news services; or radio or television news programs holding Federal Communications Commission license.

My employer is (business name) ....., my immediate superior is ....., who may be reached at (phone) .....

I have familiarized myself with Policy Statement 1220.1B governing my conduct during interviews and visits within the institution and agree to comply fully with them.

When allegations are made by the inmate interviewed against the Department of Justice or the Bureau of Prisons, or any staff member, or against another inmate, I agree to give the affected party a reasonable opportunity to respond.

I hereby fully and completely waive my personal right to be free from search of my person or property so long as I remain within the boundaries of the institution grounds.

I agree to provide no compensation, either direct or indirect, to the inmate or his or her family for any interview or correspondence. I further agree to respect the rights of privacy of all inmates and to obtain a release from any inmate before any photos or recordings are utilized or personal information derived from

any interview or correspondence is used in any publication or broadcast. [14]

I recognize a visit to a prison presents certain hazards, and I agree to assume all ordinary and usual risks to my personal safety inherent in a visit to an institution of this type.

.....

(Signature)

Subscribed and sworn to before me this .....
day of ..... 19.....

.....

NOTARY PUBLIC

Copy to: media representative
Original to: inmate's file [15]

Attachment 2
1220.1B

BP-DIR-13
July, 1976

7/1/76

(SAMPLE TRANSMITTAL LETTER)

UNITED STATES PENITENTIARY
Leavenworth, Kansas

.....

Date

The attached letter was placed in our Prisoners Mail Box for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a problem over which this institution or the Bureau of Prisons has jurisdiction, you may wish to write to me or to the Director, Bureau of Prisons, Department of Justice, Washington, D.C. 20534.

You may write back to the inmate, and ask him questions. Your letter will be inspected for contraband, and for any content which would incite illegal conduct or conduct which violates institution rules. Also, personal interviews are permissible under certain conditions.

The Bureau of Prisons encourages the press to visit institutions, and learn about correctional programs and activities. If you wish to do this, please contact me.

Inmates may not receive any compensation, nor anything of value, for correspondence or interviews with the news media. If the person writing you names another inmate or a staff member in his correspondence, we request that you advise us of that fact before its publication. We will provide background information and specific comments whenever possible.

If the writer encloses, for forwarding, correspondence addressed to another addressee, please return the enclosure to me, or to the Director.

Non-compliance with the above must result in a withdrawal of such access. All materials sent to or received from an inmate not authorized herein, or by Bureau policy, shall constitute contraband within the meaning of 18 U.S.C. 1791, which provides a sentence of up to 10 years. This includes the introduction into, or taking from, any correctional institution anything whatsoever contrary to any rule or regulation.

WARDEN [16]

Attachment 3
Page 1
1220.1B

BP-DIR-14
July, 1976

U. S. BUREAU OF PRISONS

Date .....

Inmate's name and number (print) .....

Name of Institution .....

Name of news media representative .....

Name of media represented .....

Address of media represented .....

I, the above-named inmate, do hereby freely give permission to the above-named news media representative to interview me on or about (date) ..... and I do hereby authorize the news media represented by this person to use any information gathered about me during this interview for any legitimate purpose. I further authorize the Bureau of Prisons and the Department of Justice, and their authorized representatives, to release to representatives of the news media any documents or information relating to allegations or comments made by me in this interview.

Inmate's signature .....

Witness ..... Title .....

I, the above-named inmate, refuse permission to the above-named news media representative to interview me.

Inmate's signature .....

Witness ..... Title .....

* * * *

I, the above-named inmate, do further freely give permission to the above-named news media representative to make recordings of my voice during this interview and to take photos of me (still, movie, or video) and I do hereby authorize the use of such pictures or recording by the news media represented by this person for any legitimate purpose.

Inmate's signature .....

Witness ..... Title .....

Original to: inmate's file

Copy to: media representative [17]

DUNIWAY, Circuit Judge (concurring):

I concur, but I confess to having serious doubts about the result, not because I think that it is wrong in principle, but because I have great difficulties in reconciling the result with the decisions in *Pell v. Procunier*, 1974, 417 U.S. 817, and *Saxbe v. Washington Post Co.*, 1974, 417 U.S. 843. I think it clear beyond the possibility of argument that the preliminary injunction from which the appeal is taken grants to KQED and other media greater access to the Santa Rita Jail than is granted to the public.

I cannot reconcile this result with the decisions in *Pell, supra*, and *Washington Post, supra*. As I read these cases, they stand for this proposition:

> ". . . Newsmen have no constitutional right of access to the scene of crime or disaster when the general public is excluded." *Branzburg v. Hayes, supra*, at 684-685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.
>
> . . . The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. *Branzburg v. Hayes, supra*, and that the government cannot restrain the publication of news emanating from such sources. Cf. *New York Times Co. v. United States, supra*. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court. Accordingly, since § 405.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protection that the First and Fourteenth Amendments guarantee. 417 U.S. at 934-35.

See also Saxbe, supra, 417 U.S. at 850.

I happen to believe that, as to most issues of public importance, and assuming that one accepts the media-created notion [18] that there is such an animal as a constitutionally protected "public's right to know" and further assuming that the media somehow embody that "right," then the media have a protected preferred right to access to information about the public's business. This is based on the proposition that, in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the public's business. Witness "Watergate" and its remarkable consequences.

But I cannot reconcile these notions with the express basis for the decisions in *Pell, supra,* and in *Washington Post, supra.* I would like to assume that those decisions are not to be taken literally, but I find nothing in them to support that assumption. Yet I am dubious about the result that they seem to require. It seems to me to be obvious that regulations governing media access to a jail, assuming that the media have a right, along with the public, to such access, must differ from regulations governing access by the public at large. It is one thing to say that representatives of the media, who are not numerous and who can readily be screened, should be able to interview inmates, take pictures, etc., and quite another thing to say that any one of the several million inhabitants of the San Francisco Bay Area, or any one of the million or so inhabitants of Alameda County, should have the same rights. The administrative problems posed by the two are obviously different, and the law ought to recognize the differences. But as I read *Pell, supra,* and *Washington Post, supra,* those cases, far from recognizing these differences, expressly disregard them. Accordingly, I must express doubt, not because I think that I ought to, but because I think that the Supreme Court's decisions require it.

HUFSTEDLER, Circuit Judge, concurring specially:

The holdings of *Pell v. Procunier* (1974) 417 U.S. 817, and *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843, are not directly involved on this appeal. The thorny question is the interpretation of the broad statement in *Pell* that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." [19]

I do not read *Pell* to mean that regulations that are reasonable in controlling access to prisons and prisoners by the general public will always pass the First Amendment test when the same regulations are imposed on the news media. In context, as I read *Pell* and *Saxbe,* the rationale means that the First Amendment does not give news media any special right of access to prisons or to prisoners and none that is not reasonably necessary to serve the public interest in being informed about prisons and prisoners. To the extent that a private person would be properly barred from interviewing prisoners or from entering portions of the prison that are private, the news media can also be barred. Neither *Pell* nor *Saxbe* involved the application of regulations imposing the same standards on news media personnel and members of the general public; in both instances the press had greater latitude than the general public. The Court did not purport to address the question whether news media could be confined constitutionally to regulations controlling access to prisons or to prisoners that govern group tours by the general public.

Although I do not disagree with Judge Pregerson's statement that, under *Pell* and *Saxbe,* "the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right," I do not believe that the statement is helpful in absence of any description of what the public's right is or how the right is to be vindicated.

Two separate, but related questions are involved: (1) What kind of information about prisons and prisoners does the public

have a right to know? Or, to put the question differently, from what kind of information about prisons and prisoners should the public be excluded? (2) What kinds of limitations can be imposed on the public and on the news media upon the means by which the information to which the public is entitled can be gathered?

The Court in *Pell* recognized that conditions in our Nation's prisons are matters of great public importance about which the public should be informed. To that end, the public's right to knowledge about the conditions of prisons and prisoners is very extensive. Information should not be curtailed except to the extent reasonably necessary to shield the prisoners' small store of personal privacy, to protect the physical security of the prison, [20] the prisoners, and the prison personnel, and to allow prison personnel enough privacy and administrative control to permit them effectively to perform their duties. As the eyes and ears of the public, newsmen are entitled to see and to hear everything within the institution about which the general public is entitled to be informed. The public is not entitled to know everything that the inmates say and do or everything that goes on in the prison. For instance, the public is not entitled to know the contents of the conversations between an inmate and his religious adviser, his lawyer, or his wife, nor to have a transcript of an executive session of prison administrators, nor to know the combination of prison locks. The interests in personal privacy, prison security and discipline, and effective management of the institution in these respects outweigh the public's general interest in being informed about prison conditions. News media, as surrogates for the public, cannot claim any constitutional entitlement to acquire information from which the general public is appropriately excluded.

Assuming that the information to be gathered is of a kind that the public is entitled to know, the question then is focused

on the means by which the information is to be acquired. Here, we are concerned solely with gathering information inside a prison. Prisons, like other public institutions, have some areas from which the public, whether represented by one private citizen or by a member of the news media, must be barred at least some of the time. A prison warden could no more do his job if his private office was always on public display, than could a judge if he were obliged to hold perpetual open house in his chambers. In addition, however, prisons present special problems that do not have exact counterparts in other public institutions where security, discipline, and potential violence are not as omnipresent. Regulations controlling access to prisons and to prisoners, of course, can and should take these special circumstances into account. However, it does not follow that regulations that are reasonable under the circumstances as applied to touring groups of the public are also reasonable as applied to news media personnel.

Guided public tours and news media access do not serve identical purposes nor do they involve identical practical problems. Both kinds of visits are methods of providing to the public [21] information about the prison and prisoners. The media mission, however, is different in degree, though not in kind, from the display to a tour group. The newsmen's function is to gather, to collate, and to transmit to a wide public audience all of the information which the public is entitled to know about prison conditions. A private tour group might have similar or better ability to gather information than newsmen, but it would be rare that the combination of training and the means of transmission enjoyed by the news media would be found in a tour group. An adequate view of prison conditions is unlikely if the observer is confined to the areas of prisons and the times of visitation that are appropriate for conducted tours. As Judge Duniway points out, the administrative problems posed by news-

men and tour groups are very different. For instance, the public is entitled to know about the kind of food that is served and the circumstances under which it is prepared. It would be very difficult to guide a tour group through all of the steps of service and preparation without serious disruption of the service and the kitchen, but a small crew of media personnel could adequately observe and report the proceedings without undue interference. Moreover, it should be obvious that a candid view of prisons and prison life is not possible if both the news media and the general public are limited to white glove inspections at hours and on days scheduled by prison administrators for their own convenience.

I agree with Judge Pregerson that the preliminary injunction issued by the district court is consonant with the teaching of *Pell* and *Saxbe*. [22]

Original Filed
Nov 20 1975

Clerk, U. S. Dist. Court.
San Francisco.

In the United States District Court
for the Northern District
of California

C-75-1257-OJC

KQED, Inc., et al.,
Plaintiffs,

v.

Thomas L. Houchins,
Defendant.

PRELIMINARY INJUNCTION

In accordance with the Memorandum and Order in the above-captioned action, and good cause appearing therefor,

IT IS HEREBY ORDERED that defendant Thomas L. Houchins, his agents, subordinates, employees and all other acting in accordance with him are preliminarily enjoined during the pendency of this action from excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from denying KQED news personnel and responsible representatives of the news media access to the

Santa Rita facilities, including Greystone, at reasonable times and hours.

IT IS HEREBY FURTHER ORDERED that defendant is preliminarily enjoined from preventing KQED news personnel and responsible representatives of the new media from utilizing [1] photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities.

IT IS HEREBY FURTHER ORDERED that defendant may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous.

Dated: November 19th, 1975.

OLIVER J. CARTER
United States District Judge [2]

Original Filed Nov 20 1975
Clerk, U. S. Dist. Court.
San Francisco.

In the United States District Court
for the Northern District
of California

C-75-1257-OJC

KQED, Inc., et al.,
Plaintiffs,
v.
Thomas L. Houchins,
Defendant.

MEMORANDUM AND ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

On June 17, 1975 plaintiffs KQED and two local branches of the National Association for the Advancement of Colored People filed a civil rights complaint against the Sheriff of Alameda County, alleging deprivation of First and Fourteenth Amendment rights by virtue of defendant's exclusion of KQED news personnel from the Alameda County Jail at Santa Rita. Plaintiffs concurrently filed a motion for preliminary injunction. At a conference in chambers the Court indicated an intention to issue a preliminary injunction and urged the parties to arrive at mutually agreeable terms. Upon their failure to do so, an evidentiary hearing was held. Based upon testimony taken at the hearing and presentation of a substantial body of documentary evidence, today the Court grants injunctive relief.

A summary of the background of this case facilitates understanding of the Court's rationale for granting such relief. The complaint alleged that KQED, as a local nonprofit, publicly-supported corporation engaged in educational [1] television and radio broadcasting, has a long-standing concern with prisons

and jails in the San Francisco Bay Area and has regularly reported on newsworthy events at such institutions. On March 31, 1975 KQED's Newsroom program reported the suicide of an inmate in the Greystone portion of Santa Rita, together with certain allegations made by a Santa Rita psychiatrist as to jail conditions. Newsroom's anchorman requested permission of Sheriff Houchins to inspect the Greystone facility and was refused on grounds of "policy". The complaint further alleged that such refusal was arbitrary and served no legitimate public interest. Plaintiffs sought an order enjoining defendant from excluding KQED from covering newsworthy events at Santa Rita, including the Greystone portion of the jail.

As of July 14, 1975 the Sheriff began implementation of a program of monthly public tours of Santa Rita, with reservations on a first come, first served basis. Ground rules for the tours included a prohibition of any conversation with inmates and a ban on cameras and tape recorders. In opposing the motion for preliminary injunction defendant has contended that the public tours, together with the inmates' mail and visiting privileges, afford adequate media access.

In so contending, defendant has placed great reliance on dictum from *Pell v. Procunier*, 417 U.S. 817, 834 (1974) to the effect that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." In *Pell* the Supreme Court upheld a California State Prison regulation prohibiting interviews with individual inmates specifically designated by representatives of the press. The Court found a substantial governmental interest in curtailing the practice of concentrating attention on a small number of inmates who thereby had become "public figures" within the prison and the source of severe disciplinary [2] problems. However, the Court carefully noted that the subject regulation was not designed to frustrate media investigation and reporting of prison conditions and that the media has access not only to a program of public tours but

also to interviews of inmates selected at random—precisely the access sought by plaintiffs in this case. Therefore, this Court reads *Pell* as standing for the proposition that a prison or jail administrator may curtail media access upon a showing of past resultant disruption or present institutional tensions. Defendant has not made such a showing in this case.

Defendant's presentation at the evidentiary hearing focused on the program of public tours, tracing the tours' itinerary and introducing photographs of the jail which are offered for sale at the tours' conclusion. There was testimony that the tour groups, which are limited to twenty-five persons, include people from all walks of life. Sheriff Houchins admitted that funding by the Board of Supervisors has not been secured for the tours beyond this December, although he intends to urge continued funding of an expanded program. Plaintiffs argued, however, that all tours were completely booked shortly after their announcement and thus KQED presently has no access to the jail. Moreover, plaintiffs' witnesses stressed the inadequacy of the tours for media purposes because of the lack of opportunity to photograph conditions, interview inmates and cover newsworthy events as they occur. As developed at the hearing, not only do the public tours fail to enter certain areas of the jail, but the photographs offered for sale omit certain of the jail's characteristics, such as catwalks located above the cells.

Inadequacy of the present Santa Rita press policy seems more apparent in view of the testimony of San Francisco County Sheriff Richard Hongisto and San Quentin's Public [3] Information Officer William Merkle. Sheriff Hongisto permits media interviews of inmates at the four jails under his jurisdiction and has not experienced any resultant disruption. Mr. Merkle testified that San Quentin inmates are interviewed by the media with no security or prison administration problems. Their testimony indi-

cates that a more flexible press policy at Santa Rita is both desirable and attainable.

Sheriff Houchins admitted that because Santa Rita has never experimented with a more liberal press policy than that presently in existence, there is no record of press disturbances. Furthermore, the Sheriff has no recollection of hearing of any disruption caused by the media at other penal institutions. Nevertheless Sheriff Houchins stated that he feared that invasion of inmates' privacy, creation of jail "celebrities," and threats to jail security would result from a more liberal press policy. While such fears are not groundless, convincing testimony was offered that such fears can be substantially allayed.

As to the inmates' privacy, the media representatives commonly obtain written consent from those inmates who are interviewed and/or photographed, and coverage of inmates is never provided without their full agreement. As to pre-trial detainees who could be harmed by pre-trial publicity, consent can be obtained not only from such inmates but also from their counsel. Jail "celebrities" are not likely to emerge as a result of a random interview policy. Regarding jail security, any cameras and equipment brought into the jail can be searched. While Sheriff Houchins expressed concern that photographs of electronic locking devices could be enlarged and studied in order to facilitate escape plans, he admitted that the inmates themselves can study and sketch the locking devices. Most importantly, there was substantial testimony [4] to the effect that ground rules laid down by jail administrators, such as a ban on photographs of security devices, are consistently respected by the media.

Thus upon reviewing the evidence concerning the present media policy at Santa Rita, the Court finds that plaintiffs have demonstrated irreparable injury, absence of an adequate remedy at law, probability of success on the merits, a favorable public interest,

and a balance of hardships which must be struck in plaintiffs' favor.

In fashioning the form of preliminary injunction, however, the Court has carefully refrained from usurping the Sheriff's role as jail administrator. By way of this Memorandum the Court merely notes that meaningful press access to a jail includes some use of cameras and inmate interviews. The specific methods of implementing such a policy must be determined by Sheriff Houchins. Of course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances. If plaintiffs believe that a dangerous situation does not in fact exist, they are likewise free to make such a showing to the Court.

Accordingly, IT IS ORDERED that plaintiffs' motion for a preliminary injunction be, and the same is, hereby granted, subject to the restrictions set forth in the form of preliminary injunction.

Dated: November 19th, 1975.

OLIVER J. CARTER
United States District Judge [5]

United States Court of Appeals for the Ninth Circuit

No. 75-3643

KQED, Inc., Alameda Branch and Oakland Branch, National Association for the Advancement of Colored People,
Plaintiffs-Appellees,

vs.

Thomas L. Houchins, individually and in his official capacity as Sheriff of Alameda County,
Defendant-Appellant.

ORDER

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and PREGERSON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation. [1]

Supreme Court of the United States

No. A-594

Thomas L. Houchins, Sheriff of the County of Alameda, California,
Applicant,

v.

KQED, Inc., et al.

On Application for Stay.

[February 1, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Houchins is the sheriff of Alameda County in the State of California and in that capacity controls access of the press and public to the Alameda County jail. Respondents KQED, Inc., a nonprofit educational television-radio station, and the Alameda and Oakland branches of the NAACP, sued applicant in the United States District Court for the Northern District of California in order to obtain an injunction granting KQED personnel access to the Alameda County jail at Santa Rita. The District Court granted respondents a preliminary injunction on November 20, 1975, which restrained applicant:

> ". . . [F]rom excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.
>
> ". . . [F]rom denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours.

". . . [F]rom preventing KQED news personnel and [1] responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities. [Applicant] may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous."

Applicant sought a stay of this order in the Court of Appeals for the Ninth Circuit, and a two-judge panel of the court granted the stay on December 24, 1975, observing that:

"the injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell v. Procunier,* 417 U. S. 817 (1974) and *Saxbe v. Washington Post Co.,* 416 U. S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay."

Applicant's appeal was thereafter heard by a different panel of the Court of Appeals which affirmed the order of the District Court. Applicant filed a petition for rehearing and suggestion for rehearing en banc, and a motion for stay of mandate, all of which were denied. He now requests that I stay the injunction pending the filing and disposition of a petition for certiorari to review the judgment of the Court of Appeals. For the reasons set forth below, I grant his application.

The dispute between the parties centers upon questions of law, rather than of fact. The principal dispute involves the interpretation of our opinion in *Pell v. Procunier,* 417 U. S. 817 (1974). Applicant would urge that we reach the same result in this case as we did in *Saxbe v. Washington Post Co.,* 417 U. S. 843 (1974):

"We find this case constitutionally indistinguishable from *Pell v. Procunier, ante,* p. 817, and thus fully controlled by the holding in that case. '[N]ewsmen have no [2] constitutional right of access to prisons or their inmates beyond that afforded the general public.' *Id.,* at 834." *Saxbe,* 417 U. S., at 850.

Respondents, on the other hand, rely upon the Court's observation at the outset of the opinion in *Pell* that the prison regulation there involved was:

". . . not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current correction policy, both the press and the general public are afforded full opportunities to observe prison conditions. . . . In short, members of the press enjoy access to California prisons that is not available to other members of the public." *Id.,* at 831.

Concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in *Pell.* Public access to the Alameda County jail at Santa Rita presently consists of monthly public tours which, in the words of the Court of Appeals, "were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversation with inmates, and omitted views of many parts of the jail, including the notorious Greystone building." Here the injunction did grant to the press greater[1] access to the jail than the pubilc is granted, a result seemingly inconsistent with our holding[2] in *Pell* that the press is not entitled to greater access. But respondents suggest that the access given to the press in this case by the injunction may, as a factual

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1. See *KQED, Inc. v. Houchins,* (CA9, No. 75-3643, Nov. 1, 1976), Slip op., at 18 (Duniway, J., concurring).

2. See *Saxbe v. Washington Post, supra,* at 850. [3]

matter, not significantly exceed that given to the press in *Pell* before the injunction and after our disposition of that case.

The Court of Appeals struggled with the resolution of this issue. Judges Chambers and Sneed, in granting the stay before argument, felt that the injunction went beyond that which we countenanced in *Pell*. The panel that decided the issue on the merits unanimously affirmed the District Court, but each member of the panel wrote separately. In discussing the injunction, which he felt clearly granted the press greater access than is granted to the public, Judge Duniway, in his concurring opinion, was moved to conclude:

> "I cannot reconcile this result [the injunction] with the decisions in *Pell, supra,* and *Washington Post, supra.*" *KQED, Inc. v. Houchins,* Slip op., at 18. (Duniway, J., concurring.)

Judge Hufstedler, concurring specially, viewed the reconciliation of the injunction in this case with the holdings in *Pell* and *Washington Post* as a "thorny question." *Id.*, at 19.

The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the "no greater access" doctrine of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary. In my opinion at least four Justices of this Court would vote to grant certiorari to resolve this issue, if for no other reason than that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the

first instance by this Court, rather than by the Court of Appeals or by the District Court.

Of course, I accord due deference to the judges of the Ninth Circuit who declined to grant the stay. See *Winters v. United States,* 89 S. Ct. 57, 21 L. Ed. 2d 80 (1968) (Douglas, J., in chambers). But such deference does not relieve me of the obligation to decide the issue:

> "Although a judge of the panel which entered this order [4] refused to grant a stay, I would nevertheless stay the order if persuaded by the record that the questions presented for review in the petition for certiorari had sufficient merit to make review by this Court likely." *Board of School Commissioners v. Davis,* 84 S. Ct. 10, 11, 11 L. Ed. 2d 26, 27 (1963) (Black, J., in chambers).

For the reasons set forth above, I think that the issue in this case is of sufficient importance to surmount the threshold barrier confronting all stay applications: reasonable likelihood that the petition for certiorari will be granted. *E. g., English v. Cunningham,* 80 S. Ct. 659, 4 L. Ed. 2d 42 (1959) (Frankfurter, J., in chambers).

Respondents suggest that, regardless of the correctness of the decision below, the equities do not favor the applicant, and that it is they, the respondents, who will suffer the irreparable injury should a stay be granted. Respondents contend that they are irreparably injured each time they are denied news coverage; applicant suggests that in the District Court hearing "there was uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour." Respondents' intimation that the interim denial of their access to the prison, in violation of their asserted First and Fourteenth Amendment rights, will inexorably injure them in a way that applicant cannot be injured by the injunctive restraint—which he asserts is based on a

misapprehension of the Constitution—is one with which I cannot agree. There are equities on both sides of the case.

I would be more hesitant to disturb the District Court's preliminary injunction if it were evident that the injunction were actually "preliminary" to substantial further proceedings which might substantially modify that injunction. But the injunction was issued some 15 months ago, after a full evidentiary hearing, and none of the parties suggests that there are any new factual or legal issues which would cause the District Court to modify it. The injunction has in fact been stayed virtually since its issuance, and I conclude that, in light of the present posture of the case and given the sub-[5]stantial chance that the petition for certiorari will be granted, the preservation of that status quo is an important factor favoring a stay. This is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time. See *Edelman v. Jordan*, 414 U. S. 1301, 1303 (1973) (REHNQUIST, J., in chambers).

The preliminary injunction issued by the District Court in this case on November 20, 1975, should therefore be and hereby is stayed pending the filing of a timely petition for certiorari by applicant, and the disposition of the petition and the case by this Court. [6]